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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAY 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of) MM Docket No. 93-94
Scripps Howard)
Broadcasting Company) File No. BRCT-910603KX
For Renewal of License of)
Station WMAR-TV,)
Baltimore, Maryland)
and)
Four Jacks) File No. BPCT-910903KE
Broadcasting, Inc.)
For a Construction Permit for)
a New Television Facility on)
Channel 2 at Baltimore, Maryland)
To: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

**OPPOSITION TO PETITION TO ENLARGE ISSUES
AGAINST SCRIPPS HOWARD BROADCASTING COMPANY**

Respectfully submitted,

Scripps Howard
Broadcasting Company

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SUMMARY

In its Petition to Enlarge Issues Against Scripps Howard Broadcasting Company ("Petition"), Four Jacks Broadcasting, Inc. ("Four Jacks") has sought the addition of issues against Scripps Howard Broadcasting Company ("Scripps Howard") based on alleged anticompetitive activities, alleged employment discrimination, and alleged abuse of process. Four Jacks has based its Petition, however, on matters that simply cannot support the addition of the requested issues.

Four Jacks initially asks the Commission to add issues based on alleged anticompetitive misconduct at Scripps Howard's Sacramento, California and Glasgow, Kentucky cable systems. In neither case, however, has there been any adjudication of misconduct against Scripps Howard. Under the Commission's policies and holdings regarding anticompetitive misconduct, there is no basis to add the requested issue absent such an adjudication, and Four Jacks' request must, therefore, be denied.

Four Jacks next seeks the addition of an issue against Scripps Howard for failure to report an adjudication against it of anticompetitive misconduct. Four Jacks makes this request in spite of the Commission's own rulings that there has been no such adjudication and that Scripps Howard had nothing to report. Four Jacks' request on this issue must also be denied.

Four Jacks also seeks the addition of an issue based on findings in an employment discrimination suit. The decision at issue was vacated, however, and, under the applicable legal

standard, all factual determinations in the proceeding were vacated with the decision. Furthermore, the Commission had full notice of this case before it when it granted the license renewal of the Scripps Howard station against which the allegations had been made, clearly indicating that this matter did not affect Scripps Howard's qualifications to be a licensee. Therefore, Four Jacks' request on this issue must be denied.

Finally, Four Jacks seeks to add an issue against Scripps Howard for alleged abuse of process. The record, however, shows that Scripps Howard behaved appropriately in each instance. First, Scripps Howard raised a valid issue of general importance against the short-form assignment applications of Four Jacks' principals, and Scripps Howard did not in any way seek to delay or in fact delay any action by Four Jacks' principals. Second, Nationwide Communications, Inc., following an FCC inspection of its tower, properly proposed to change the Commission's records with respect to the tower which is used by its Station WPOC(FM) and which is proposed as the transmitter site in Four Jacks' application, and Scripps Howard properly participated in that proceeding. Third, Scripps Howard took care to appropriately conduct its investigation of Four Jacks' tower's structural capability with respect to the tower's tenant who had relevant information. Fourth, Scripps Howard properly advised Baltimore County officials of the need for local approval of Four Jacks' proposed tower height change and offered these officials relevant information which suggests that such a height increase would adversely affect public safety due to

the overstressing of the current tower that would result. In each case, the record shows that Scripps Howard's conduct was appropriate, and therefore, Four Jacks' request on this issue must be denied.

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To: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

**OPPOSITION TO PETITION TO ENLARGE ISSUES
AGAINST SCRIPPS HOWARD BROADCASTING COMPANY**

Scripps Howard Broadcasting Company ("Scripps Howard"), licensee of Station WMAR-TV, Baltimore, Maryland and applicant for renewal in the above referenced proceeding, by counsel and pursuant to Section 1.229 of the Commission's rules, hereby files its opposition to the Petition to Enlarge Issues Against Scripps Howard Broadcasting Company ("Petition"), filed by Four Jacks Broadcasting, Inc. ("Four Jacks").

Introduction

1. Four Jacks has requested the addition of issues against Scripps Howard based on alleged anticompetitive activities, alleged employment discrimination and alleged abuse of process. Four Jacks' requests, however, are based on a lawsuit where no Scripps Howard related company was a party, lawsuits that were

never adjudicated, a case that was vacated, and plainly legitimate filings and inquiries by Scripps Howard. In sum, Four Jacks has based its Petition on matters that simply cannot support the addition of the requested issues.

**Scripps Howard Has Not Been Adjudicated
to Have Engaged in Anticompetitive Activities
With Respect to Sacramento Cable**

2. Four Jacks has requested an issue to determine whether Scripps Howard should not be a Commission licensee due to alleged anticompetitive activity. Petition at 1. Four Jacks' request for this issue demonstrates a fundamental misunderstanding of the Constitutional requirements of due process and of the Commission's policies regarding allegations of anticompetitive conduct by licensees or prospective licensees.

3. Four Jacks' claim of anticompetitive activity is primarily based on special jury verdicts in Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) ("PacWest"). The Petition is the sixth attempt to apply those special verdicts to Scripps Howard in a Commission proceeding. This latest attempt, the second by Four Jacks,¹ is as futile as the other five because, as Four Jacks admits--and as the Commission has held--neither Scripps Howard nor any related company was a party to that proceeding.

¹ Scripps Howard has already responded to Four Jacks' allegations regarding the PacWest proceeding in its Opposition to Request for Certification filed Apr. 19, 1993.

4. The PacWest plaintiff, Pacific West Cable Company ("PacWest"), claimed that the procedures by which the Sacramento City Council and County Board of Supervisors awarded an exclusive cable franchise in their joint franchise area violated the First Amendment and the Sherman Act. Id. at 1324-25.² The only defendants in the proceeding were the local governments.

5. Even though the Court dismissed the plaintiff's antitrust claims for failure to state a claim on which relief could be granted, Id. at 1325-28, the jury reached two special verdicts on related issues. The two special verdicts read:

- d. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS [the local governments] TO PROMOTE THE MAKING OF CASH PAYMENTS AND PROVISION OF "IN KIND" SERVICES BY THE COMPANY ULTIMATELY SELECTED TO PROVIDE CABLE TELEVISION SERVICE TO THE SACRAMENTO MARKET?

YES X NO

- e. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS TO OBTAIN INCREASED CAMPAIGN CONTRIBUTIONS FOR LOCAL ELECTED OFFICIALS?

YES X NO

Id. at 1350. By their terms, these special verdicts deal solely with conduct by the defendants. They do not purport to be holdings against any Scripps Howard related company.

6. Subsequent to the PacWest decision, Weststar Communications, a company that is related to PacWest through the interests of a shared principal, filed informal objections against

² The defendants awarded the franchise to Cablevision of Sacramento, in which Scripps Howard was a partner. Id. at 1325. The current franchisee is Sacramento Cable Television, a subsidiary of Scripps Howard.

the license renewals of Scripps Howard's Stations WXYZ-TV, WEWS-TV, and WCPO-TV. Weststar alleged, inter alia, that the special verdicts were an adverse adjudication of anti-competitive conduct against Scripps Howard and that Scripps Howard had an obligation to report them. On November 27, 1989, the Video Services Division ("VSD") denied the informal objections in a letter that specifically stated, "Scripps Howard was not a party to the suit brought by the Pacific West Cable Company and, therefore, was under no obligation to report a case to which it is not a party." See Exhibit A.

7. Weststar filed a petition for reconsideration of the VSD's decision and a petition to deny the renewal of Scripps Howard's television Station KSHB containing the same allegations.³ See Exhibit B. The VSD later granted Weststar's request to withdraw both petitions and stated:

"[W]e have fully considered the matters set forth and we conclude there are no substantial and material questions of fact that warrant any further inquiry in either proceeding."

The VSD further held that Scripps Howard was qualified to be a licensee.

8. In spite of the Commission's rulings on Weststar's petitions, PacWest filed a petition for reconsideration, relying on the same Sacramento proceedings, of the grant of Scripps Howard's application to assign the license of WMAR-TV from Gillett

³ The pleadings in the proceedings discussed here and below run to several hundred pages. Scripps Howard will supply copies on the Presiding Judge's request.

Broadcasting of Maryland, Inc. to Scripps Howard. The VSD later
granted, PacWest's request to discontinue that notation. See Exhibit

9. When the Commission ruled that Scripps Howard did not have to report the findings in the PacWest proceeding because it was not a party to that proceeding, the Commission clearly found there had been no adjudication against Scripps Howard in PacWest. FCC Form 303-S, which Scripps Howard filed in connection with the renewal of WXYZ-TV, WEWS-TV, WCPO-TV and WMAR-TV, requires an applicant to report any adverse adjudication of "broadcast related antitrust or unfair competition." FCC Form 303-S Question 6. The Commission's determination that Scripps Howard had no obligation to report the PacWest decision in the WXYZ-TV, WEWS-TV or WCPO-TV renewals was, therefore, a determination that PacWest was not an adjudication against Scripps Howard. If PacWest had been an adjudication against Scripps Howard, the Commission would have held Scripps Howard was obligated to report it in those renewal proceedings. Furthermore, the Commission has ruled four times that the matters raised in the PacWest proceedings do not affect Scripps Howard's qualifications to be a licensee. See Exhibits A,B,C & D. The allegations arising from the PacWest case have been thoroughly reviewed by the Commission staff and resolved in Scripps Howard's favor and should not be raised again in this proceeding.

Even excluding consideration of the context of the ASD's statement, it defies logic to assert that the ASD would intend--or could bind the Commission to--the bizarre position that allegations regarding anti-competitive activity by Scripps Howard's cable subsidiary could legally be dismissed in a renewal proceeding where they were raised, but would nevertheless require further resolution in an even more remote renewal proceeding where the allegations had not been raised.

10. Even if the Commission had not made four explicit rulings in Scripps Howard's favor regarding the PacWest allegations, it would be a violation of due process to apply against Scripps Howard the verdicts of a proceeding in which it did not participate on the merits and to which it was not even a party. It is fundamental that an individual or company is not bound by a judgment in litigation in which it is not designated as a party or in which it has not been made a party by service of process. Martin v. Wilks, 490 U.S. 755, 762 (1989); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940). In Martin, the Supreme Court made this point clear by quoting from an earlier case, Chase Nat'l Bank v. Norwalk, 291 U.S. 431 (1934), in which Justice Brandeis said:

Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

the PacWest proceeding cannot be regarded as an adjudication against it.

**Non-Adjudicated Allegations of Anticompetitive
Activities Are Not Subjects for Commission Review**

12. In addition to trying to add an issue based on the PacWest verdicts, Four Jacks asks that allegations of other non-adjudicated anticompetitive activities at Scripps Howard's Glasgow, Kentucky cable system be explored at hearing. This represents a fundamental misunderstanding of Commission policy. The Commission has explicitly stated:

[We] are of the view that, for the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility for policing such activity.

Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1202 (1986) Reconsideration denied, F.C.C. Rcd 421, policies modified, 5 F.C.C. Rcd 3252 (1990) (emphasis added).

13. In its Memorandum Opinion and Order ruling on Petitions for Reconsideration of the Character Qualifications policy statement, the Commission reemphasized that it would only consider adjudicated findings of anticompetitive conduct. Policy Regarding Character Qualifications, 1 F.C.C. Rcd 421, 422 (1986), policies modified, 5 F.C.C. Rcd 3252 (1990) (Character Qualifications II). In Character Qualifications II, the Commission rejected the argument, put forth here by Four Jacks, that it must consider allegations of anticompetitive misconduct even if there

has been no adjudicated finding of a violation of antitrust laws. Id. Contrary to Four Jacks' assertion in this proceeding, the Commission specifically held that National Broadcasting Co. v. U.S., 319 U.S. 190 (1943), does not require it to review such non-adjudicated allegations. Character Qualifications II, 1 F.C.C. Rcd at 422.

14. In Dubuque TV Limited Partnership, the Commission applied its policy regarding anticompetitive conduct to a situation where the accused party had allegedly admitted to such conduct. 4 F.C.C. Rcd 1999 (1989). Even though one party had allegedly admitted to committing the offending conduct, the Commission held that adjudicated status is essential to the relevance of a charge of anticompetitive activity and that absence of such an adjudication is fatal to the claim of a party attempting to make allegations of such misconduct. Id. The Commission went on to state that, even if it assumed the truth of the allegations, there was no basis for denial of an application absent an actual adjudication of anticompetitive activity. Id.

15. When the Commission refused to consider non-adjudicated findings of anticompetitive misconduct, it explicitly recognized that:

[T]he Commission is not the appropriate agency to engage in the initial investigation, adjudication or enforcement of the antitrust laws.

Character Qualifications II, 1 F.C.C. Rcd at 422. Four Jacks' attempt to seek review of non-adjudicated anticompetitive allegations, in regard to both the PacWest decision and the Glasgow

matter, would result, if successful, in the Commission engaging in exactly the type of activity it rejected--performing the initial investigation, adjudication and enforcement of antitrust laws.⁶ That would be particularly difficult in this context because, as the judge recognized in PacWest, the law with respect to appropriate competition in cable television service was developing at the time of the PacWest decision. PacWest, 627 F. Supp at 1326. There is no reason to believe the law is more settled now or more amenable to resolution by the Commission.

16. As demonstrated above, there has been no adjudication of broadcast related anticompetitive misconduct against Scripps Howard in PacWest or any other proceeding. Therefore, under the Commission's statements in Character Qualifications and Character Qualifications II, and its holding in Dubuque TV, there is no basis to add the requested issue. Four Jacks' request must, therefore, be denied.

**There Is No Basis To Add A Misrepresentation
And Lack of Candor Issue Against Scripps Howard**

17. Four Jacks seeks the addition of a misrepresentation and lack of candor issue against Scripps Howard for not reporting the PacWest decision to the Commission. As discussed in paragraph 6, supra, the Commission has held that Scripps Howard was not a

⁶ Four Jacks' reliance on Focus Television Corp., 98 F.C.C.2d 546, 552 n.11 (Rev. Bd. 1984), modified, 1 F.C.C. Rcd 1037, is misplaced. Focus Television dealt with a proceeding in which there were two adjudicated findings that an applicant had lied under oath to a government tribunal, in contrast to this proceeding where there are no adjudicated findings of misconduct.

party to the PacWest proceeding and has explicitly stated that Scripps Howard had no obligation to report the findings in PacWest. Exhibit A. Therefore, based on the Commission's own rulings, Four Jacks' request must be denied.

**There Is No Basis To Add An Issue
Regarding Scripps Howard's Employment Practices**

18. Four Jacks seeks to add "an appropriate issue" against Scripps Howard based on the findings in Lowery v. WMC-TV, 658 F. Supp. 1240 (W.D. Tenn. 1987). In Lowery, the District Court initially found that Myron Lowery had been the victim of employment discrimination. The Court, however, vacated its decision just a few weeks later in Lowery v. WMC-TV, 661 F. Supp. 65 (W.D. Tenn. 1987).

19. The general rule in federal courts is that once a judgment is vacated, for any reason, it loses its conclusive

20. Even if the Lowery decision did retain any effect following vacatur, the Commission has already considered the Lowery case in connection with the renewal application of the very station involved in the alleged discrimination, WMC-TV. As the attached Exhibit E demonstrates, Scripps Howard reported the Lowery decision as a final action in connection with the then pending renewal application for Station WMC-TV. The application was subsequently amended as appropriate to report the vacating of the Lowery decision by the court. Scripps Howard's WMC-TV renewal application was not denied or even delayed due to the Lowery litigation. Therefore, the Commission has already determined in the most directly relevant proceeding, and contemporaneously with the Lowery decisions, that the allegations in the Lowery proceeding do not affect Scripps Howard's qualifications to be a Commission licensee. Four Jacks' request must, therefore, be denied.

**Scripps Howard Has Not Engaged In
Any Abuse Of The Commission's Processes**

21. Contrary to Four Jacks' mischaracterizations of the record, Scripps Howard has complied fully with the letter and the spirit of the Commission's decisions on appropriate applicant conduct. To put Four Jacks' proposed abuse of process issue in context, the cases upon which it relies involve (1) a mayor's possible improper use of and influence on city employees to intimidate a competing applicant and to interfere with that applicant's efforts to obtain a building permit, see Rocket Radio, Inc., 56 F.C.C.2d 238, 242 (Rev. Bd. 1975), and (2) an applicant's apparent effort to interfere tortiously with another applicant's

private agreement to use a tower site, see WIOO, Inc., 28 Rad. Reg.2d (P&F) 685 (1973). Scripps Howard, in contrast, has investigated the suitability of Four Jacks' proposed tower site in an entirely non-interfering manner and has involved itself in matters concerning Four Jacks' principals only before government agencies and only by raising appropriate issues. The specific allegations raised will be addressed individually:

**a. Scripps Howard's Objections To The
Short-Form Assignment Applications
For Four Jacks' Principals' Stations**

22. Scripps Howard filed a petition for reconsideration of the Commission staff's hasty grant of short-form assignment applications for three television stations owned by Four Jacks' principals, as well as an objection to the related and then still ungranted application for the assignment of associated private microwave licenses in Baltimore to one of the proposed new licensees, Chesapeake Television Licensee, Inc. See Petition Exhibits 9 & 12. The broadcast applications had been granted on the first business day after public notice was issued despite the fact that a promised exhibit to the Baltimore application remained unfiled. See Petition Exhibit 9 at 2-3. After the missing exhibit was filed, Scripps Howard sought reconsideration of the broadcast grants and informally opposed the microwave proposals, arguing principally that grant of the broadcast applications violated Commission precedent because the applicants proposed to reserve all the significant powers and responsibilities associated with being a Commission licensee to the assignor corporation rather than

station's assets and its operation. That is, by the terms of the agreements underlying the assignments, the new Commission licensee would lack "ultimate control over programming personnel, operations, maintenance and policies" of the station because these powers were expressly to be retained in the assignor corporation. See, e.g., the "Assignment and Use Agreement" ("Use Agreement") filed by Four Jacks' principals in connection with the assignment from Chesapeake Television, Inc. to Chesapeake Television Licensee, Inc. at ¶ 4 (copy attached as Exhibit F). The Use Agreement further stated that the assignor would "manage and direct day-to-day operations" of the station, such as "providing staffing, selling advertising time, operating and maintaining the business, and assuring compliance with FCC requirements." Id. at ¶ 2. Finally, the assignor was left with full responsibility for all capital expenditures, received all the station's operating revenues, and enjoyed the power to sell the station. Id. at ¶¶ 2 & 6. All three assignment applications had basically the same provisions, and thus, the sole purpose of the assignment proposals appeared to be to isolate the new de jure corporate licensees from all licensee responsibilities and duties.

25. The Mass Media Bureau staff decision denying Scripps Howard's objection simply ignored the central issue that the assignor corporation would retain full control and focused instead on the fact of common ownership and control of the assignor and assignee corporations--a point Scripps Howard never contested. See Petition Exhibit 16 at 2. As Scripps Howard's Reply had explained,

however, since the Commission's rules require the filing of an application for any assignment, even where ultimate ownership does not change, "the Commission does not view commonly owned entities as interchangeable licensees." See Petition Exhibit 11 at 2-3. The Commission necessarily is interested in the entity that controls the license as well as in the parties controlling that entity. Otherwise, for example, a notification process would suffice. Given this fact, the staff's sole focus on the common ownership of the different entities was plainly inadequate.

26. Further, the Commission has relied on the "well established principle of corporation law that a corporate subsidiary has a separate identity from its parent company" in holding that differing regulatory consequences may flow solely from the presence or absence of a corporate barrier separating commonly owned subsidiaries. See Character Inquiry Reconsideration, 1 F.C.C. Rcd 421, 423 (1986) policies modified, 5 F.C.C. Rcd 3252 (1990). Thus, creating a corporate barrier between the de facto and de jure licensees is not without regulatory effect and permitting applicants to erect such a barrier between (1) the entity controlling the station's assets, its day-to-day operations, and even its FCC rule compliance, and (2) the entity entrusted by the Commission with the broadcast license, cannot, on its face at least, be seen to serve the public interest.

27. Four Jacks' principals' applications stated in support of the proposals only that the applications were being filed "to accommodate a lender". See Petition Exhibit 10 at 2.

**(3) Scripps Howard Did Not Engage In Any
Delaying Activities, And No Evidence Has Been
Presented That Any Adverse Delay to Four Jacks'
Principals' Interests Actually Occurred**

28. Scripps Howard's objections raised a valid and straight-forward legal issue for the Commission's consideration. It raised the matter with respect to the Baltimore microwave licenses because they remained ungranted and thus no argument could be raised that the objection was untimely.

29. Scripps Howard made no effort to delay Commission consideration of any of these matters. No allegation is made, of course, that Scripps Howard urged the Private Radio Bureau to withhold action on the relocation of Station WBFF's microwave facilities pending the staff's consideration of the assignment applications. See Petition Exhibit 15. In fact, Scripps Howard finds the Private Radio Bureau's decision not to process the modification application--assuming Four Jacks has presented it accurately--quite puzzling. Clearly, the microwave modification application would be pursued by Station WBFF irrespective of whether the broadcast short-form assignment was rescinded, and thus the immediate processing of this application would appear to have been fully appropriate. In any event, Scripps Howard did not oppose Four Jacks' principals' request for expedited action in the assignment matters.

30. In fact, any microwave service delay that may have occurred--and importantly there is no supporting affidavit for Four Jacks' allegation that the delivery of any service was actually hampered--would appear to have resulted solely from the Private

Radio Bureau's odd refusal to process a modification proposal which Scripps Howard never opposed and perhaps from Four Jacks' principals' and counsel's delay in seeking expedited resolution of the assignment issues. That Four Jacks waited four months to seek expedited action on the basis of its concern about covering a long-scheduled Major League Baseball season opener can hardly be blamed on Scripps Howard, and once Four Jacks sought expedition, the Mass Media Bureau acted on the matter in three days, and the Private Radio Bureau responded relatively promptly thereafter. There is simply no way to infer from the circumstances of this matter either that Scripps Howard filed its objections with the intention of delaying any action by Four Jacks' principals or that Scripps Howard caused any such delay.

**b. Nationwide's Application To
Lower The Recorded Height Of Its Tower.**

31. Four Jacks speculates that Scripps Howard may have improperly influenced Nationwide Communications, Inc. ("Nationwide"), licensee of Station WPOC(FM), Baltimore, Maryland, to file an application correcting the height of its antenna tower. Station WPOC's tower is owned by Four Jacks' principals, and Four Jacks has proposed to locate its antenna at the top of this structure. See Petition at 26. Four Jacks also obliquely alleges that Scripps Howard's participation in the Nationwide application proceeding was unwarranted. Petition at 14.

32. In fact, contrary to Four Jacks' wholly unsupported speculations, Nationwide's application was triggered by the Commission itself. As Nationwide's attorney explains in an